

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

NO. 77-6075

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Plaintiff-Appellant,

v.

COMMITTEE OF INTERNS AND RESIDENTS, AND
NEW YORK STATE LABOR RELATIONS BOARD,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT
NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF THE ISSUE PRESENTED

Whether, Congress having given the National Labor Relations Board exclusive jurisdiction over labor relations at the health care institutions in question, a regulatory decision by the National Labor Relations Board that housestaff officers are not employees and should not have collective bargaining rights may be relitigated by the New York State Labor Relations Board.

STATEMENT OF THE CASE

This case is an action brought by the National Labor Relations Board ("NLRB") under the authority of N.L.R.B. v. Nash-Finch Co., 404 U.S. 138 (1971), to enjoin state action where the NLRB's federal power preempts the field.

The District Court (Judge Charles E. Stewart, Jr.) held that the procedural requisites to enjoining the state action were satisfied, but denied the NLRB's motion for a preliminary injunction and dismissed the complaint on the merits because it found that the NLRB had relinquished its jurisdiction to the state. This appeal is brought under 28 U.S.C. 1291 and 1294. The District Court's decision is reported as National Labor Relations Board v. Committee of Interns and Residents and the New York State Labor Relations Board, 426 F. Supp. 438 (S.D.N.Y. 1977), and is reprinted beginning at page 39 of the Appendix.^{1/} The District Court's decision was filed on February 2, 1977 and was followed by a final order of judgment on March 7, 1977 (A. 72). The NLRB's notice of appeal was filed on May 4, 1977 (A. 162).

This case arises out of the 1974 amendments ("health care amendments")^{2/} to the National Labor Relations Act ("the Act"),^{3/} which extended the jurisdiction of the NLRB to non-profit health care institutions. Prior to amendment, Section 2(2) of the Act excluded from the statutory definition of employer, "any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual." Pursuant to Public Law 93-360, Section 2(2) was amended to delete that exclusion. 29 U.S.C. 152(2). The 1974 health care amendments added Section 2(14) to the Act. Section 2(14) defines a health care institution as "any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care

^{1/} "A." references are to the printed appendix to the briefs.

^{2/} Public Law 93-360, 93d Cong., 2d Sess. (approved July 26, 1974); 88 Stat. 395. See Statutory Appendix A hereto.

^{3/} 49 Stat. 449 (1935), as amended by 61 Stat. 136 (1947), 73 Stat. 541 (1959), 88 Stat. 395 (1974); 29 U.S.C. 151-169. See Statutory Appendix B hereto.

facility, or other institution devoted to the care of sick, infirm or aged persons." 29 U.S.C. 152(14).

Following the enactment of the health care amendments, a number of organizations filed election petitions with the NLRB seeking to represent and bargain collectively for physicians in training at non-profit teaching hospitals as interns, residents, and clinical fellows ("housestaff officers"). On March 23, 1976, the NLRB issued its lead decision on the question, Cedars-Sinai Medical Center, 223 NLRB 251, in which it concluded that housestaff officers, although they "possess certain employee characteristics," are "primarily engaged in graduate educational training" and "their status is therefore that of students rather than of employees" within the meaning of Section 2(3) of the Act. Accordingly, the NLRB dismissed the petition which sought representation of the housestaff officers at Cedars-Sinai.^{4/}

On April 14, 1976, the Committee of Interns and Residents ("CIR"), one of the organizations which had petitioned the NLRB and a defendant-appellee herein, filed an election petition with the New York State Labor Relations Board ("NYSLRB"), the labor relations agency for the state of New York and also a defendant-appellee herein, seeking to represent and bargain collectively for housestaff officers at Misericordia Hospital Center. On July 14, 1976, the NYSLRB dismissed the CIR's petition, in Misericordia Hospital Medical Center, 39 SLRB No. 32, stating in part:

^{4/} A number of other petitions were dismissed on the basis of Cedars-Sinai. See St. Christopher's Hospital, 223 NLRB 166 (1976); University of Chicago, 223 NLRB 1032 (1976); St. Clare's Hospital, 223 NLRB 1002 (1976); Buffalo General Hospital, 224 NLRB No. 17 (1976); Wayne State University, 226 NLRB No. 168 (1976).

It is undisputed that [Misericordia], like similar non-profit hospitals, is now subject to the jurisdiction of the [National Labor Relations Board]. Representation proceedings, such as that now before us . . . are cognizable under Section 9 of the [National Labor Relations Act.]

In a similar representation proceeding, [Cedars-Sinai Medical Center, 223 NLRB No. 57], the [National Labor Relations Board] held that interns, residents and fellows are not "employees" within the meaning of Section 2(3) of the [National Labor Relations Act]. This Board has found otherwise as to Section 701(3) of the State Act during the period that non-profit making hospitals were under its jurisdiction.

The question of possible state jurisdiction here is certainly not free from doubt. Cogent arguments can be, and have been made on both sides of the issue. On balance, we have concluded that further processing of this matter before this Board is not warranted at this time. Accordingly, we shall dismiss the petition. [39 SLRB No. 32 at 2 (footnote omitted).]

On the basis of its decision in Misericordia, the NYSLRB shortly thereafter dismissed unfair labor practice charges, which the CIR had also filed, alleging that five other hospitals where the CIR already represented housestaff officers had violated the State Labor Relations Act by refusing to bargain with the CIR concerning the wages, hours, and other conditions of employment of housestaff.^{5/}

The CIR then sued in state court to compel the NYSLRB to reinstate and process its petition and charges. The state court initially ruled that the NYSLRB was free to take jurisdiction over housestaff officers. In its opinion of

^{5/} Albert Einstein College of Medicine, SU-49810, July 21, 1976; Brookdale Hospital Medical Center, Hospital for Joint Diseases and Medical Center, and Beth Israel Medical Center, letter dated August 17, 1976; Long Island Jewish-Hillside Medical Center, letter dated August 25, 1976.

October 14, 1976, the state court said:^{6/}

In a spate of cases following Cedars-Sinai, the National Board dismissed the petitions solely on the ground that the status of the interns, residents and clinical fellows involved were "not unlike" that of those involved in Cedars-Sinai. But, in its most recent decision [Kansas City General Hospital, 225 NLRB No. 14 (1976)] involving interns, residents and clinical fellows, the National Board expanded its ruling, and held that the not-for-profit hospital there involved "is not an employer" within the meaning of Section 2(2) of the Act. . .for the purpose of any disputes relating to such personnel". . . .

Since, then, as the National Board has now ruled, the intervening hospitals are not "employers" as defined by the National Labor Relations Act with respect to disputes relating to interns, residents and clinical fellows, it follows that the jurisdiction of respondent State Board over disputes between petitioner and the intervening hospitals is unaffected by the 1974 amendments to the National Labor Relations Act, and therefore the Board retains the same jurisdiction it previously possessed.

On November 8, 1976, the NLRB issued a revised decision in its Kansas City case, which had been relied on by the state court. In Kansas City General Hospital, 225 NLRB No. 14A, the NLRB stated:

Since its issuance, the Board's Decision and Order herein has been cited, specifically by the Supreme Court of the State of New York, in support of the view that the Board does not consider state jurisdiction over interns and residents to have been preempted by the 1974 health care amendments to the National Labor Relations Act. To eliminate unnecessary language appearing in the Board's Decision and Order herein, which in our view has prompted the New York Supreme Court to resolve improperly the preemption question, and to eliminate any doubt that

^{6/} Committee of Interns and Residents v. New York State Labor Relations Board, 388 N.Y.S. 2d 509, 512 (Sup. Ct. N.Y. Co.) (Gellinoff, J.).

it was the intention of a majority of the Board, in Cedars-Sinai, to find state jurisdiction over residents, interns, and fellows to have been pre-empted by the Federal statute, we have decided, sua sponte, to reconsider and revise the Decision and Order issued in the above-entitled proceeding, and to substitute this Decision for the earlier one.

In the instant case, the Petitioner, as noted above, is seeking to represent a unit of residents and interns employed by Hospital Hill. The parties have stipulated, and we find, that Hospital Hill is an employer within the meaning of the Act and thus that it will effectuate the policies of the Act to assert jurisdiction herein. [225 NLRB No. 14A at 2-3 (footnotes omitted).]

The NLRB went on to say:

Turning to the preemption question, we believe that it has now become necessary for us to state explicitly that which is, in our view, implicit in the Board's Decision in Cedars-Sinai; that is, at the risk of being somewhat repetitious, that the majority of this Board intended by its decision therein to find federal preemption of the health care field to preclude States from exercising their power to regulate in this area. It is our judgment that the Congress, in passing the 1974 health care amendments, simply made a determination that residents, interns, and fellows, inter alia, were not supervisors within the meaning of the Act, but left the question as to whether they were "employees" entitled to collective-bargaining rights for resolution by the Board in the exercise of its discretion. Having exercised its discretion in Cedars-Sinai, by finding residents, interns and fellows to be primarily students and not "employees" within the meaning of the Act, the Board confirmed, in our view, that it has not put hospital residents and interns beyond the reach of national labor policy, but has rather held that to extend them collective-bargaining rights would be contrary to that very policy. [225 NLRB No. 14A at 4-5 (footnotes omitted).]

Shortly after issuing its revised decision in Kansas City, the NLRB filed the instant action in the District Court. While the District Court had this case under advisement, the state court reversed its earlier decision.

The state court concluded, in its decision dated January 6, 1977:^{7/}

The Board having, at last, clearly indicated what its intention was in the line of cases commencing with Cedars-Sinai, the issue of preemption is beyond this Court's power to determine. Petitioner's remedy lies with the Federal Courts, or with Congress to review the accuracy and sagacity of the Board's interpretation of the National Labor Relations Act. The Board's finding that "federal preemption of the health care field" precludes "States from exercising their power to regulate in this area" (Kansas City General Hospital, supra), is binding upon this Court.

Accordingly, the prior decision and judgment of this Court must be recalled and vacated, the application for relief pursuant to CPLR Article 78 denied, and the petition dismissed.

The District Court then issued its decision herein.^{8/} It found that the NLRB had relinquished jurisdiction over housestaff officers because the NLRB had denied them employee status and collective bargaining rights. The District Court summed up its reasoning in the following terms (A. 70-71):

To summarize, our jurisdiction has been properly invoked under 28 U.S.C. § 1337 and we may exercise this jurisdiction under the Nash-Finch exception to the prohibition of 18 U.S.C. § 2283. Because of the NLRB's ruling that housestaff are not "employees" under the NLRA, the labor relations of housestaff physicians are not subject to the provisions of the Act and are not within the jurisdiction of the Board. We conclude that the NLRA does not preempt the exercise of state power over the labor relations of housestaff because we find that there is no national labor policy which requires that housestaff be unregulated by all bodies of labor law and controlled only by the free play of economic forces. Accordingly, we deny plaintiff's motion for a preliminary injunction and we grant defendant CIR's motion for summary judgment.

^{7/} Committee of Interns and Residents v. New York State Labor Relations Board, 391 N.Y.S. 2d 503, 505 (Sup. Ct. N.Y. Co.). The State court denied reargument on January 20, 1977, 391 N.Y.S. 2d 503.

^{8/} The decision is dated January 31, 1977, but was filed February 2, 1977. The decision takes into account the State court's reversal of itself (A. 46).

In light of the District Court's decision that the NYSLRB does have jurisdiction over the CIR's petition and charges, the NYSLRB has decided to process the petition and charges and is currently undertaking to do so.^{9/}

^{9/} Misericordia Hospital Medical Center, et al., 40 SLRB No. 26
(May 6, 1977).

ARGUMENT

CONGRESS HAVING GIVEN THE NLRB EXCLUSIVE JURISDICTION OVER LABOR RELATIONS AT THE HEALTH CARE INSTITUTIONS IN QUESTION, A REGULATORY DECISION BY THE NLRB THAT HOUSESTAFF OFFICERS ARE NOT EMPLOYEES AND SHOULD NOT HAVE COLLECTIVE BARGAINING RIGHTS MAY NOT BE RELITIGATED BY THE NYSLRB.

A. Congress Has Given The NLRB Exclusive Jurisdiction Over Labor Relations At The Health Care Institutions In Question.

As shown in the Statement, supra, p. 2, Congress, in 1974, amended the National Labor Relations Act to extend the coverage of the Act and the jurisdiction of the NLRB to non-profit health care institutions. The legislative history of the amendments shows that Congress recognized and intended that any existing state laws would be superseded by the federal law, in the interest of having a "national approach" to the issues involved in the labor relations of health care institutions. 120 Cong. Rec. S. 6942 (daily ed. May 2, 1974) (remarks of Sens. Taft and Mondale). The Congressional desire for a uniform Federal policy is illustrated by the comments of Senator Williams, the chief sponsor of the legislation in the Senate, who stated that "the general purpose of the National Labor Relations Act, as interpreted by the Board and the courts, is to attempt to establish a uniform pattern of collective bargaining rules nationwide, without local variation." 120 Cong. Rec. S. 12104 (daily ed. July 10, 1974). It was for this reason, Senator Williams said, that attempts to amend the bill to allow for local variation in the treatment of labor relations at health care institutions had been defeated in both House and Senate. Ibid. Likewise Representative Thompson, the House sponsor, observed that "it is apparent that the Federal law preempts any State law," 120 Cong. Rec. H. 6393

(daily ed, July 11, 1974), and further stated that the "bill should pass to cover all 50 states. . . ." 120 Cong. Rec. H. 4593 (daily ed. May 30, 1974).

The focus of the Congressional debate was not on whether some power should be reserved to the states, but rather was on whether the NLRB — having been granted exclusive jurisdiction over the labor relations of health care institutions — could or should cede some jurisdiction back to the states under Sections 10(a) and 14(c) of the Act.^{10/} The legislative history shows that Congress had in mind no means other than Sections 10(a) and 14(c) by which the NLRB could revest in the states any of the jurisdiction which Congress granted exclusively to the NLRB. 120 Cong. Rec. S. 6942, S. 12104-12105, H. 4588, H. 4592-H. 4599, H. 6393 (daily eds. May 2, May 30, July 10, July 11, 1974). Even the amendment offered by Representative Quie in an effort to dilute the preemptive effect of the new health care amendments was nothing more than proposed amendment of Section 10(a) which would have allowed the NLRB to cede jurisdiction on a hospital-by-hospital basis to a state whose labor statute was "substantially equivalent" to the federal Act. The Quie amendment was defeated by the House of Representatives. 120 Cong. Rec. H. 4592-H. 4599 (daily ed. May 30, 1974).

^{10/} Section 10(a) of the Act allows the Board to cede jurisdiction over a case or class of cases. Section 10(a) reads in pertinent part: ". . . the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry . . . even though such cases may involve labor disputes affecting commerce. . . ." Section 14(c) of the Act allows the Board to cede jurisdiction over an employer or class of employers. Section 14(c) reads in pertinent part: "The Board, in its discretion, may . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. . . ." 29 U.S.C. 160(a) and 164(c).

In short, the legislative history makes it clear that Congress intentionally provided for a paramount and uniform federal policy regarding the labor relations of health care institutions by granting the Board an exclusive jurisdiction which supersedes "equivalent State labor relations laws and agencies." 120 Cong. Rec. S. 12110 (daily ed. July 10, 1974) (remarks of Sen. Buckley).

B. The NLRB Has Decided That Housestaff Officers At The Health Care Institutions In Question Are Not Employees And Should Not Have Collective Bargaining Rights.

In the course of formulating a national approach to the labor relations of health care institutions, the NLRB has concluded--beginning with its decision in Cedars-Sinai Medical Center, supra, p. 3--that interns, residents, and clinical fellows are not employees within the meaning of the Act, and should not be awarded collective bargaining rights. The NLRB arrived at this conclusion in Cedars-Sinai after it examined the relationship between housestaff and hospital, and found that relationship to be "an educational rather than [an] employment relationship." 223 NLRB at 254. Thus, although housestaff officers "possess certain employee characteristics," they are "primarily engaged in graduate educational training" and, therefore, "are not employees within the meaning of Section 2(3) of the Act." 223 NLRB at 251, 253. As the NLRB further explained recently in St. Clare's Hospital & Health Center, 229 NLRB No. 158 (decided May 26, 1977), the academic nature of the relationship between hospital and housestaff precludes the NLRB from extending collective bargaining rights to housestaff officers, for collective bargaining is not readily adaptable to an educational relationship. As the NLRB pointed out, there

are substantial differences between a student-teacher relationship and an employee-employer relationship, since "[t]he former is predicated upon a mutual interest in the advancement of the student's education and is thus academic in nature," while "[t]he latter is largely predicated upon conflicting interests of the employer to minimize costs and the employees to maximize wages, and is thus economic in nature." 229 NLRB No. 158 at 9. The NLRB further observed that "the collective-bargaining process is itself fundamentally an economic process," and stated that "from the standpoint of national labor policy, subjecting academic decisionmaking to collective bargaining is at best of dubious value because academic concerns are largely irrelevant to wages, hours, and terms and conditions of employment." Ibid.

In concluding that hospital housestaff officers should not have collective bargaining rights, the NLRB has not ceded back to the states, under either Section 10(a) or Section 14(c) of the Act, any of the jurisdiction granted exclusively to the NLRB. Indeed, the NLRB plainly stated in the revised Kansas City decision, supra, p. 6, that it intended for its determination regarding housestaff to have a preemptive effect. Moreover, the NLRB has made clear that it has not relinquished jurisdiction over interns, residents, and clinical fellows, nor has it placed these classifications beyond the purview of national labor policy, but rather has held that "to extend [housestaff] collective-bargaining rights would be contrary to that very policy." 225 NLRB No. 14A at 5. The NLRB reiterated in St. Clare's, supra, that "we have indeed asserted jurisdiction over all classifications at health care institutions—including housestaff—but feel that extending bargaining privileges to residents, interns, and fellows would not be in the best interest of national labor policy."

229 NLRB No. 158 at 13. Thus, in developing a "national approach" to the issues involved in the labor relations of health care institutions, the NLRB has made a regulatory determination that national labor policy would not be served by extending collective bargaining rights to classifications of individuals whose relationship to health care institutions is primarily academic in nature, and has retained jurisdiction over these classifications so that its determination can be uniformly applied.

The NLRB's determination regarding housestaff is, as the NLRB explained in St. Clare's, in keeping with the NLRB's treatment of cases involving similar relationships between students and their educational institutions--that is, cases in which "students perform services at their educational institutions which are directly related to their educational program." 229 NLRB No. 158 at 7. The NLRB noted that it has excluded such students from bargaining units which encompass nonstudents, and has also denied the students the right to be represented separately.^{11/} The NLRB's stated rationale for denying these students collective bargaining rights is that "[s]ince the individuals are rendering services which are directly related to--and indeed constitute an integral part of--their educational program, they are serving primarily as students and not primarily as employees." 229 NLRB No. 158 at 7-8.

The NLRB was acting well within its discretion when it made its determination regarding housestaff, for the legislative history of the 1974 amendments shows clearly that Congress contemplated that the NLRB would exercise its expertise and apply its general standards in determining who

^{11/} The Leland Stanford University, 214 NLRB 621 (1974); Adelphi University 195 NLRB 639 (1972).

should have the right to bargain collectively with health care institutions. Both the Senate and House committee reports on the health care amendments show that Congress had considered proposals to amend Section 2(11) of the Act so as to exclude housestaff and other classifications from the statutory definition of "supervisor." Congress, however, made note of the NLRB's carefully developed standards for the application of Section 2(11) to health care professionals, and consequently did not enact the proposed amendments to Section 2(11). Rather, Congress left such determinations to the NLRB's informed discretion, stating that it expected the NLRB "to continue evaluating the facts of each case in this manner when making its determinations." S. Rep. No. 93-766, 93 Cong., 2d Sess. 6 (1974); H.R. Rep. No. 93-1051, 93 Cong., 2d Sess. 7((1974). As the NLRB stated in St. Clare's, "It is precisely this sort of factual analysis which has led us to conclude that not only are housestaff not supervisors, but the confluence of their institutional responsibilities and academic development preclude the regulation of this relationship through collective bargaining." 229 NLRB No. 158 at 14.

C. The NYSLRB May Not Relitigate A Regulatory
Decision Made By The NLRB Within The Exercise
Of Its Exclusive Jurisdiction.

As we have shown, the NLRB, in developing a uniform national approach to the issues involved in the labor relations of health care institutions, has determined that housestaff officers should not be given collective bargaining rights, since their relationship with health care institutions is essentially an academic one which is not adaptable to the collective bargaining process. This regulatory determination by the NLRB may not be relitigated by the NYSLRB

in the context of considering the matters submitted to the NYSLRB by the CIR, for such relitigation would amount to an intrusion into the NLRB's exclusive jurisdiction over the labor relations in health care institutions and an interference with the NLRB's congressionally-mandated development of a national labor policy to govern collective bargaining in the health care industry. The trial court conceded that Congress granted the NLRB exclusive jurisdiction over the labor relations of health care institutions (A. 57-59); furthermore, the trial court recognizes that the court cannot, in this Nash-Finch proceeding, review the merits of the NLRB's determination that housestaff are not employees within the meaning of the Act and should not be awarded collective bargaining rights (A. 59-60). Yet despite the trial court's recognition that Congress gave the NLRB exclusive jurisdiction over the health care industry, the court contends that the state of New York--via its labor relations agency, the NYSLRB--is not preempted from treating housestaff as employees, since the NLRB, by concluding that housestaff are not employees, has somehow relinquished its jurisdiction over housestaff. The trial court further contends that in view of the Board's determination that housestaff are not employees within the meaning of the Act, state regulation of housestaff is not preempted because it will better fulfill the Congressional purpose of having full regulation of labor relations in the health care industry.

The trial court's conclusion that the states are not preempted from regulating housestaff as employees has as its basis the premise that the NLRB has ceded its jurisdiction over housestaff and that the states must be allowed to step in and fill this regulatory void. With such a premise, the court's

conclusion must fail, for the NLRB has stated clearly that it does not intend to cede jurisdiction over housestaff matters. As the NLRB declared in its revised Kansas City decision, "the majority of this Board intended by its decision [in Cedars-Sinai] to find federal preemption of the health care field to preclude States from exercising their power to regulate in this area." 225 NLRB No. 14A at 4. In St. Clare's the NLRB reiterated its intention to retain exclusive jurisdiction over housescaff matters. It is clear, then, that the NLRB has no intention to hand back jurisdiction over housestaff to the states; nor has the NLRB ceded jurisdiction by operation of law regardless of its intent. As discussed, supra, p. 10, Sections 10(a) and 14(c) of the Act are the only vehicles by which the NLRB may cede jurisdiction back to the states. Not only has the NLRB never invoked Sections 10(a) or 14(c) in any of its decisions regarding housestaff, but also the essential predicates to the operation of those provisions are not supplied by the NLRB's decisions. Release of jurisdiction under Section 10(a) must be of a case or class of cases; the NLRB however, has asserted its jurisdiction and decided the merits of the housestaff cases. Release of jurisdiction under Section 14(c) must be of an employer or class of employers; the NLRB, as it made clear in its revised Kansas City decision, has retained jurisdiction over health care institutions as employers.

The trial court was also in error in saying that the NLRB's resolution of the housestaff issue left a regulatory void which the states are free to fill by granting housestaff an employee status. The error again lies in the court's treating the NLRB's conclusion as a cession of jurisdiction, for instead the NLRB's conclusion was a regulatory determination

that housestaff should not be granted collective bargaining rights since their relationship with their health care institutions is academic in nature. When the NLRB has determined that national labor policy would not be served by imposing collective bargaining—a method of providing order in economic relationships—on the parties to an academic relationship, the state of New York is not free to interfere with the NLRB's regulatory decision on national labor policy by extending collective bargaining rights to these parties. Thus, it is clear that the trial court's conclusion is theoretically and practically impossible, for the state cannot reverse the NLRB's finding that housestaff are not employees. Any determination by the state that housestaff are employees would amount to an interference in the NLRB's contrary and paramount determination, and would involve the state in the regulation of an area which Congress intended to be occupied wholly by federal law. As for the notion that the state could acquiesce in the NLRB's conclusion that housestaff are not employees, but nevertheless determine that housestaff, as students, are entitled to collective bargaining rights as a matter of state law, the obvious answer is that the extension, in any guise, of bargaining rights to housestaff over wages, hours, and the like would intrude upon national labor policy as enunciated by the NLRB.

Permitting the states to step in to accord collective bargaining rights to housestaff is analogous to allowing them to grant such rights to managerial employees even though the Supreme Court has held that national labor policy precludes the extension of bargaining rights to that classification of individuals. N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267 (1974). The analogy between the treatment of managerial employees and housestaff is apt, since both classifications have some characteristics of employee status, but yet have been

excluded from the statutory definition of employee for national labor policy reasons. The state has no authority in regard to either of these groups, to second-guess the national policy decisions and treat members of these groups as employees.

The NLRB's determination regarding housestaff is also analogous to the situation in Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1946), in which the Supreme Court held that the state agency was precluded from regulating foremen at a time when the NLRB "for policy reasons but without renouncing jurisdiction . . . refused to approve foremen organization units." 330 U.S. at 770. The trial court acknowledges that Bethlehem would be controlling here if applicable (A. 61-63). However, since the trial court held that the NLRB relinquished jurisdiction over housestaff when it concluded that they were not employees within the meaning of the Act, the court reasoned that this declination of jurisdiction made Bethlehem inapposite here. But as shown supra, the trial court was in error when it concluded that the NLRB had ceded its jurisdiction over housestaff. The NLRB did assert jurisdiction over the housestaff petitions, just as it asserted jurisdiction of the foremen units. The NLRB dismissed the housestaff petitions, but did not give up its jurisdiction to determine whether housestaff are employees within the meaning of the Act. Thus, the NLRB's jurisdictional posture in regard to the housestaff petitions is analogous to position in regard to the foremen petitions, for as the Supreme Court explained in Bethlehem (330 U.S. at 775):

Neither did the National Board ever deny its own jurisdiction over petitions because they were by foremen. * * * It made clear that its refusal to designate foremen's bargaining units

was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes.

Likewise, the NLRB has clearly retained jurisdiction over health care institutions as employers, a position which again is analogous to the situation described by the Supreme Court in Bethlehem (330 U.S. at 776):

The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. It asserts, and rightfully so, under our decision in the Packard case, supra, its power to decide whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted. 330 U.S. at 776.

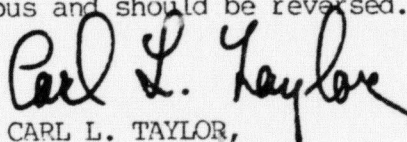
Hence, Bethlehem is apposite, for the NLRB has made a policy determination here, as in Bethlehem, that bargaining rights should not be extended to certain classifications of individuals. In view of the NLRB's exclusive jurisdiction over these classifications and the institutions for which they perform services, there remains no room for a state to reach a contrary result.

Although the states may not act in contravention of national labor policy by treating housestaff as employees and granting them collective bargaining rights, this is not to say that the states would be powerless to regulate housestaff activities in a manner consistent with national policy. In Hanna Mining Co. v. District 2, Marine Engineers Beneficial Association, AFL-CIO, 382 U.S. 181 (1965), the Supreme Court held that the exclusion of supervisors from the protections of the Act did not prevent application of state anti-picketing laws to supervisors. The Supreme Court

subsequently explained in Beasley v. Food Fair, Inc., 416 U.S. 653 (1974), that the state action in Hanna was permitted because it was consistent with the exclusion of supervisors under the Act. Thus, consistent state regulation is allowed. It is plain, however, that a state grant of collective bargaining rights to housestaff would be inconsistent with the NLRB's determination that housestaff should not be accorded bargaining rights.

CONCLUSION

For all the foregoing reasons, we submit that the District Court's order denying the NLRB's motion for preliminary injunction and dismissing the complaint on the merits is erroneous and should be reversed.


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STATUTORY APPENDIX A



Public Law 93-360
93rd Congress, S. 3203
July 26, 1974

An Act

To amend the National Labor Relations Act to extend its coverage and protection to employees of nonprofit hospitals, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 2(2) of the National Labor Relations Act is amended by striking out "or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual."

National Labor
Relations Act,
amendments.
61 Stat. 137.
29 USC 152.

(b) Section 2 of such Act is amended by adding at the end thereof the following new subsection:

"Health care
institution."

"(14) The term 'health care institution' shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person."

(c) The last sentence of section 8(d) of such Act is amended by striking out the words "the sixty-day" and inserting in lieu thereof "any notice" and by inserting before the words "shall lose" a comma and the following: "or who engages in any strike within the appropriate period specified in subsection (g) of this section,".

29 USC 158.

(d) (1) The last paragraph of section 8(d) of such Act is amended by adding at the end thereof the following new sentence: "Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) shall be modified as follows:

Infra.
Notices.
88 STAT. 395
88 STAT. 396

"(A) The notice of section 8(d)(1) shall be ninety days; the notice of section 8(d)(3) shall be sixty days; and the contract period of section 8(d)(4) shall be ninety days.

"(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3).

"(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute."

(e) Section 8 of such Act is amended by adding at the end thereof the following new subsection.

Notification
preceding
strikes.

"(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties."

Pub. Law 93-360

- 2 -

July 26, 1974

SEC. 2. Title II of the Labor Management Relations Act, 1947, is amended by adding at the end thereof the following new section:

"CONCILIATION OF LABOR DISPUTES IN THE HEALTH CARE INDUSTRY"

"SEC. 213. (a) If, in the opinion of the Director of the Federal Mediation and Conciliation Service a threatened or actual strike or lock-out affecting a health care institution will, if permitted to occur or to continue, substantially interrupt the delivery of health care in the locality concerned, the Director may further assist in the resolution of the impasse by establishing within 30 days after the notice to the Federal Mediation and Conciliation Service under clause (A) of the last sentence of section 8(d) (which is required by clause (3) of such section 8(d)), or within 10 days after the notice under clause (B), an impartial Board of Inquiry to investigate the issues involved in the dispute and to make a written report thereon to the parties within fifteen (15) days after the establishment of such a Board. The written report shall contain the findings of fact together with the Board's recommendations for settling the dispute, with the objective of achieving a prompt, peaceful and just settlement of the dispute. Each such Board shall be composed of such number of individuals as the Director may deem desirable. No member appointed under this section shall have any interest or involvement in the health care institutions or the employee organizations involved in the dispute.

"(b) (1) Members of any board established under this section who are otherwise employed by the Federal Government shall serve without compensation but shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in carrying out its duties under this section.

"(2) Members of any board established under this section who are not subject to paragraph (1) shall receive compensation at a rate prescribed by the Director but not to exceed the daily rate prescribed for GS-18 of the General Schedule under section 5332 of title 5, United States Code, including travel for each day they are engaged in the performance of their duties under this section and shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in carrying out their duties under this section.

"(c) After the establishment of a board under subsection (a) of this section and for 15 days after any such board has issued its report, no change in the status quo in effect prior to the expiration of the contract in the case of negotiations for a contract renewal, or in effect prior to the time of the impasse in the case of an initial bargaining negotiation, except by agreement, shall be made by the parties to the controversy.

"(d) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section."

SEC. 3. The National Labor Relations Act is amended by adding immediately after section 18 thereof the following new section:

"INDIVIDUALS WITH RELIGIOUS CONVICTIONS"

"SEC. 19. Any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organiza-

Board of Inquiry.
61 Stat. 152.
29 USC 171.

29 USC 183.

Ante, p. 395.

Report.

Membership.

88 STAT. 396
88 STAT. 397

Compensation.

5 USC 5332
note.

Appropriation.

65 Stat. 601.
29 USC 168.

29 USC 169.

July 26, 1974

- 3 -

Pub. Law 93-360

88 STAT. 397

tions shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious charitable fund exempt from taxation under section 501(c)(3) of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to designate such funds, then to any such fund chosen by the employee."

68A Stat. 163.
26 USC 501.

SEC. 4. The amendments made by this Act shall become effective on the thirtieth day after its date of enactment.

Effective date.
29 USC 169
note.

Approved July 26, 1974.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 93-1051 accompanying H.R. 13678 (Comm. on Education and Labor) and No. 93-1175 (Comm. of Conference).

SENATE REPORTS: No. 93-766 (Comm. on Labor and Public Welfare) and No. 93-988 (Comm. of Conference).

CONGRESSIONAL RECORD, Vol. 120 (1974):

May 2, 3, 7, considered and passed Senate.

May 30, considered and passed House, amended, in lieu of H.R. 13678.

July 10, Senate agreed to conference report.

July 11, House agreed to conference report.

STATUTORY APPENDIX B

SEC. 2. The Committee shall study and shall advise and make recommendations to the President with respect to policies that may be followed by labor, management, or the public which will promote free and responsible collective bargaining, industrial peace, sound wage and price policies, higher standards of living, increased productivity, and related manpower policies, and such other matters which could contribute to the longer-run economic well-being of the Nation.

SEC. 3. The Committee shall encourage the establishment of labor-management committees (bipartite or tripartite) in particular sectors or industries as may be appropriate.

SEC. 4. All executive departments and agencies of the Federal Government are authorized and directed to cooperate with the Committee and to furnish such information and assistance, not inconsistent with law, as it may require in the performance of its duties.

SEC. 5. The Secretary of the Treasury shall perform any functions with respect to the Committee as may be required by the Federal Advisory Committee Act (5 U.S.C. App. I).

GERALD R. FORD.

SUBCHAPTER II.—NATIONAL LABOR RELATIONS

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 186 of this title; title 42 section 2000e.

§ 152. Definitions.

When used in this subchapter—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person. (As amended July 26, 1974, Pub. L. 93-360, § 1(a), (b), 88 Stat. 395.)

AMENDMENTS

1974—Subsec. (2). Pub. L. 93-360, § 1(a), struck out provisions which had excepted from the definition of "employer" corporations and associations operating hospitals if no part of the net earnings inured to the benefit of any private shareholder or individual.

Subsec. (14). Pub. L. 93-360, § 1(b), added subsec. (14).

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by Pub. L. 93-360 effective on the thirtieth day after July 26, 1974, see section 4 of Pub. L. 93-360, set out as a note under section 169 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 50 section 784.

§ 153. National Labor Relations Board.

(c) Annual reports to Congress and the President.

The Board shall at the close of each fiscal year make a report in writing to Congress and to the

President stating in detail the cases it has heard, the decisions it has rendered, and an account of all moneys it has disbursed.

(As amended Jan. 2, 1975, Pub. L. 93-608, § 3(3), 88 Stat. 1972.)

AMENDMENTS

1975—Subsec. (c). Pub. L. 93-608 struck out requirement that report contain the names, salaries, and duties of all employees and officers employed or supervised by the Board.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 152 of this title.

§ 158. Unfair labor practices.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party, to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)–(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

§ 161

TITLE 29.—LABOR

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Providing further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties. (As amended July 26, 1974, Pub. L. 93-360, § 1(c)-(e), 88 Stat. 395, 396.)

CODIFICATION

Subsection (d) is set out in this Supplement to correct typographical error.

AMENDMENTS

1974—Subsec. (d). Pub. L. 93-360, § 1(c), (d), substituted "any notice" for "the sixty-day" and inserted ", or who engages in any strike within the appropriate period specified in subsection (g) of this section," in the loss-of-employee-status provision and added the enumeration of modifications to this subsection which are to be applied whenever the collective bargaining involves employees of a health care institution.

Subsec. (g). Pub. L. 93-360, § 1(e), added subsec. (g).

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by Pub. L. 93-360 effective on the thirtieth day after July 26, 1974, see section 4 of Pub. L. 93-360, set out as a note under section 169 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 158a, 159, 160, 183, 187, 433 of this title; title 50 section 792.

§ 160. Prevention of unfair labor practices.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 153, 158, 159, 161, 168 of this title; title 50 section 792a.

§ 161. Investigatory powers of Board.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 42 section 2000e-9.

§ 169. Individuals with religious convictions.

Any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious charitable fund exempt from taxation under section 501(c) (3) of Title 26, chosen by such employee from a list of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to designate such funds, then to any such fund chosen by the employee. (July 5, 1935, ch. 372, § 19, as added July 26, 1974, Pub. L. 93-360, § 3, 88 Stat. 397.)

EFFECTIVE DATE

Section 4 of Pub. L. 93-360 provided that: "The amendments made by this Act [enacting this section and section 183 of this title and amending sections 152 and 158 of this title] shall become effective on the thirtieth day after its date of enactment [July 26, 1974]."

SUBCHAPTER III.—CONCILIATION OF LABOR DISPUTES; NATIONAL EMERGENCIES

§ 171. Declaration of purpose and policy.

TRANSFER OF FUNCTIONS

All functions vested by law (including reorganization plan) in the Bureau of the Budget or the Director of the Bureau of the Budget were transferred to the President of the United States by section 101 of 1970 Reorg. Plan No. 2, eff. July 1, 1970, 35 F.R. 7959, 84 Stat. 2085. Section 102 of 1970 Reorg. Plan No. 2, redesignated the Bureau of the Budget as the Office of Management and Budget. See Office of Management and Budget note set out under this section in the main volume.

§ 143

have the same meaning as when used in subchapter II of this chapter as amended by this chapter.

(June 23, 1947, ch. 120, title V, § 501, 61 Stat. 161.)

§ 143. Saving provisions.

Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter. (June 23, 1947 ch. 120, title V, § 502, 61 Stat. 162.)

§ 144. Separability of provisions.

If any provision of this chapter, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby. (June 23, 1947, ch. 120, title V, § 503, 61 Stat. 162.)

SUBCHAPTER II.—NATIONAL LABOR RELATIONS

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in sections 142, 1014 of this title; title 18 section 1951; title 39 section 1209.

§ 151. Findings and declaration of policy.

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment,

or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. (July 5, 1935, ch. 372, § 1, 49 Stat. 449; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 136.)

AMENDMENTS

1947—Act June 23, 1947, amended section generally to restate the declaration of policy and to make the finding and policy of this subchapter "two-sided".

EFFECTIVE DATE OF 1947 AMENDMENT

Section 104 of act June 23, 1947, provided: "The amendments made by this title [this subchapter] shall take effect sixty days after the date of the enactment of this Act [June 23, 1947], except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title [section 153 of this title] may be exercised forthwith."

§ 152. Definitions.

When used in this subchapter—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of

a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 158 of this title.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 153 of this title.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the fore-

going the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of subparagraph (a) of this paragraph, and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in said paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(July 5, 1935, ch. 372, § 2, 49 Stat. 450; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 137.)

REFERENCES IN TEXT

The Railway Labor Act, as amended from time to time, referred to in the text, is classified to chapter 8 of Title 45, Railroads.

AMENDMENTS

1947—Act June 23, 1947, amended section generally to redefine the terms used in this subchapter and to define several new terms.

EFFECTIVE DATE OF 1947 AMENDMENT

Effective date of act June 23, 1947, see note set out under section 151 of this title.

COMMUNIST ORGANIZATIONS, AND MEMBERS

Prohibitions placed on Communist organizations, and members thereof, with respect to labor, see chapter 23 of Title 50, War and National Defense, particularly sections 782 (4A), 784, 792a, and 841 to 844 of that title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 50 section 784.

§ 153. National Labor Relations Board.

(a) Creation, composition, appointment, and tenure; Chairman; removal of members.

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947, is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent

of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

- (b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal.

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

- (c) Annual reports to Congress and the President.

The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

- (d) General Counsel; appointment and tenure; powers and duties; vacancy.

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General

Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted. (July 5, 1935, ch. 372, § 3, 49 Stat. 451; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 139; Sept. 14, 1959, Pub. L. 86-257, title VII, §§ 701(b), 703, 73 Stat. 542.)

REFERENCES IN TEXT

The Labor Management Relations Act, 1947, referred to in text, is the act of June 23, 1947, classified to this chapter.

AMENDMENTS

1959—Subsec. (b). Pub. L. 86-257, § 701(b), authorized the Board to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under section 159(c) or 159(e) of this title and certify the results thereof.

Subsec. (d). Pub. L. 86-257, § 703, authorized the President to designate the officer or employee who shall act as General Counsel in the case of a vacancy in the office of the General Counsel.

1947—Act June 23, 1947, amended section generally by increasing membership from three to five, delegating its powers and duties to a quorum of any three members, and by appointing a General Counsel and outlining his powers and duties.

EFFECTIVE DATE OF 1959 AMENDMENT

Section 707 of Pub. L. 86-257 provided that: "The amendments made by this title [to subsecs. (b) and (d) of this section and sections 158 (b)(4-7), (e), (f), 159(c)(3), 160 (l), (m) of this title] shall take effect sixty days after the date of the enactment of this Act [Sept. 14, 1959] and no provision of this title shall be deemed to make an unfair labor practice, any act which is performed prior to such effective date which did not constitute an unfair labor practice prior thereto."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 152 of this title.

§ 154. Same; eligibility for reappointment; officers and employees; payment of expenses.

(a) Each member of the Board and the General Counsel of the Board shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section

may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this subchapter shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

(b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose. (July 5, 1935, ch. 372, § 4, 49 Stat. 451; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 139.)

CODIFICATION

Provisions of subsec. (a) which prescribed the basic compensation of members of the Board and the General Counsel were omitted to conform to the provisions of the Federal Executive Salary Schedule. See section 5311 et seq. of Title 5, Government Organization and Employees.

AMENDMENTS

1947—Act June 23, 1947, amended section generally by increasing Board members' salaries from \$10,000 to \$12,000 per annum, by providing a salary of \$12,000 per annum for the General Counsel, omitting former subsec. (b) relating to the termination of the "Old Board", and redesignating former subsec. (c) relating to payment of expenses of Board, to be subsec. (b).

EFFECTIVE DATE OF 1947 AMENDMENT

Effective date of act June 23, 1947, see note set out under section 151 of this title.

REPEALS

Act Oct. 15, 1949, ch. 695, § 5(a), 63 Stat. 880, formerly set out in the credit of this section, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 655.

§ 155. Same; principal office, conducting inquiries throughout country; participation in decisions or inquiries conducted by member.

The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case. (July 5, 1935, ch. 372, § 5, 49 Stat. 452; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 140.)

AMENDMENTS

1947—Act June 23, 1947, reenacted section without change.

EFFECTIVE DATE OF 1947 AMENDMENT

Effective date of act June 23, 1947, see note set out under section 151 of this title.

§ 156. Same; rules and regulations.

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter. (July 5, 1935, ch. 372, § 6(a), 49 Stat. 452; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 140.)

REFERENCES IN TEXT

The Administrative Procedure Act, referred to in the text, is classified to section 551 et seq. of Title 5, Government Organization and Employees.

CODIFICATION

Section 6 of act July 5, 1935, did not contain a subsection (b).

AMENDMENTS

1947—Act June 23, 1947, provided that the rules and regulations issued by the Board should be in the manner prescribed by the Administrative Procedure Act.

EFFECTIVE DATE OF 1947 AMENDMENT

Effective date of act June 23, 1947, see note set out under section 151 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 158 of this title.

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; no employee shall be required to refrain from any such activities except to the extent that such activities may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title. (July 5, 1935, ch. 372, § 7, 49 Stat. 452; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 140.)

AMENDMENTS

1947—Act June 23, 1947, restated rights of employees to bargain collectively and added provision that they have the right to refrain from joining in concerted activities with their fellow employees.

EFFECTIVE DATE OF 1947 AMENDMENT

Effective date of act June 23, 1947, see note set out under section 151 of this title.

COMMUNIST ORGANIZATIONS, AND MEMBERS

Prohibitions placed on Communist organizations, and members thereof, with respect to labor, see chapter 23 of Title 50, War and National Defense, particularly sections 782 (4A), 784, 792a and 841 to 844 of that title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 158, 158a, 433 of this title; title 50 section 792a.

§ 158. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any

action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159 (a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to

perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) of this section the payment, as a condition precedent to

becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c) (1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees and labor organizations by paragraphs (2)–(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into

any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a) (3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title. (July 5, 1935, ch. 372, § 8, 49 Stat. 452; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 140; Oct. 22, 1951, ch.

534, § 1(b), 65 Stat. 601; Sept. 14, 1959, Pub. L. 86-257, title II, § 201(e), title VII, §§ 704(a)—(c), 705(a), 73 Stat. 525, 542.)

AMENDMENTS

1959—Subsec. (a) (3). Pub. L. 86-257, § 201(e), eliminated words "and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 159 (f), (g), (h) of this title" following "such agreement when made" in cl. (1).

Subsec. (b) (4). Pub. L. 86-257, § 704(a), among other changes, substituted "Induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment" for "Induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment" in cl. (1), added cl. (11), and inserted provisions relating to agreements prohibited by subsection (e) of this section in cl. (A), the proviso relating to primary strikes and primary picketing in cl. (B), and the last proviso relating to publicity.

Subsec. (b) (7). Pub. L. 86-257, § 704(c), added subsec. (b) (7).

Subsec. (e). Pub. L. 86-257, § 704(b), added subsec. (e).

Subsec. (f). Pub. L. 86-257, § 705(a), added subsec. (f).

1951—Subsec. (a) (3). Act Oct. 22, 1951, substituted "and has at . . . such an agreement" "and (11) . . . to make such an agreement."

1947—Act June 23, 1947, amended section generally by stating what were unfair labor practices by a union as well as by an employer, and by adding provisions protecting the right of free speech for both employers and unions.

EFFECTIVE DATE OF 1959 AMENDMENT

Subsecs. (b) (7), (e), and (f) of this section, and amendments to subsecs. (b) (4)—(6) of this section effective sixty days after Sept. 14, 1959, see section 707 of Pub. L. 86-257, set out as a note under section 153 of this title.

EFFECTIVE DATE OF 1947 AMENDMENT

Effective date of act June 23, 1947, see note set out under section 151 of this title.

UNFAIR LABOR PRACTICES PRIOR TO JUNE 23, 1947

Section 102 of act June 23, 1947, provided: "No provision of this title [this subchapter] shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this act [June 23, 1947] which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title [subsecs. (a) (3) and (b) (2) of this section] shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act [June 23, 1947], or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) [subd. (3) of this section] of the National Labor Relations Act prior to the effective date of this title [sixty days after June 23, 1947] unless such agreement was renewed or extended subsequent thereto."

AGREEMENTS REQUIRING MEMBERSHIP IN A LABOR ORGANIZATION AS A CONDITION OF EMPLOYMENT

Section 705(b) of Pub. L. 86-257 provided that: "Nothing contained in the amendment made by subsection (a) [adding subsec. (f) of this section] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law."

CROSS REFERENCES

Actions by and against labor organizations, see section 185 of this title.

Boycotts and other unlawful combinations, right to sue, see section 187 of this title.
Federal Credit Unions, providing facilities for operations of, see section 158a of this title.

Federal employment denied persons who assert right to strike against Government, see section 7311 of Title 5, Government Organization and Employees, and section 1918 of Title 18, Crimes and Criminal Procedure.

Injunctive relief granted to Board against unfair labor practices and boycotts, see section 160(j) and (l) of this title.

Restrictions on payments and loans to employee representatives, see section 186 of this title.

Right to strike preserved, see section 163 of this title.
Strikes subject to injunction, see section 178 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 158a, 159, 160, 187, 433 of this title; title 50 section 792.

§ 158a. Providing facilities for operations of Federal Credit Unions.

Provision by an employer of facilities for the operations of a Federal Credit Union on the premises of such employer shall not be deemed to be intimidation, coercion, interference, restraint or discrimination within the provisions of sections 157 and 158 of this title, or acts amendatory thereof. (Dec. 6, 1937, ch. 3, § 5, 51 Stat. 5.)

§ 159. Representatives and elections.

(a) Exclusive representatives; employees' adjustment of grievances directly with employer.

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board.

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to

enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) Hearings on questions affecting commerce; rules and regulations.

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160 (c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for

the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

(d) Petition for enforcement or review; transcript.

Whenever an order of the Board made pursuant to section 160 (c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) Secret ballot; limitation of elections.

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158 (a) (3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. (July 5, 1935, ch. 372, § 9, 49 Stat. 453; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 143; Oct. 22, 1951, ch. 534, § 1 (a), (b), 65 Stat. 601; Sept. 14, 1959, Pub. L. 86-257, title II, § 201(d), title VII, § 702, 73 Stat. 525, 542.)

AMENDMENTS

1959—Subsec. (c) (3). Pub. L. 86-257, § 702, substituted "Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike" for "Employees on strike who are not entitled to reinstatement shall not be eligible to vote."

Subsecs. (f) and (g). Pub. L. 86-257, § 201(d), repealed subsecs. (f) and (g), which required unions to file their constitutions, bylaws and a report, prescribed the contents of the report and directed the filing of annual financial reports, and are now covered by section 431 of this title.

Subsec. (h). Pub. L. 86-257, § 201(d), repealed subsec. (h), which related to affidavits showing union's officers free from Communist Party affiliation or belief.

1951—Subsec. (e). Act Oct. 22, 1951, § 1(c), deleted former subdivision (1) and renumbered subdivisions (2) and (3) as (1) and (2).

Subsecs. (f)—(h). Act Oct. 22, 1951, § 1(d), deleted "No petition under section 159(e)(1) shall be entertained" wherever appearing.

1947—Act June 23, 1947, amended section generally to allow employees to carry their grievances directly to the employer, to circumscribe certain powers of the Board, to make the union file with the Secretary of Labor its constitution, bylaws, and report before being certified as a bargaining agent, to require annual reports by labor

unions, and to require labor unions to file affidavits with the Board showing that none of its officers are affiliated with or believe in the Communist Party.

EFFECTIVE DATE OF 1959 AMENDMENT

Amendment of subsec. (c) (3) of this section by Pub. L. 86-257 effective sixty days after September 14, 1959, see section 707 of Pub. L. 86-257, set out as a note under section 153 of this title.

EFFECTIVE DATE OF 1947 AMENDMENT

Effective date of act June 23, 1947, see note set out under section 151 of this title.

CERTAIN CERTIFICATIONS OF BARGAINING UNITS UNAFFECTED

Section 103 of act June 23, 1947, provided: "No provisions of this title [this subchapter] shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act [this section] prior to the effective date of this title [sixty days after June 23, 1947] until one year after the date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title [sixty days after June 23, 1947], until the end of the contract period or until one year after such date, whichever first occurs."

COMMUNIST ORGANIZATIONS, AND MEMBERS

Prohibitions placed on Communist organizations, and members thereof, with respect to labor, see chapter 23 of Title 50, War and National Defense, particularly sections 782 (4A), 784, 792a and 841 to 844 of that title.

FEDERAL RULES OF CIVIL PROCEDURE

Application of rules, see rule 81, Title 28, Appendix, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 153, 158, 161, 168 of this title; title 50 section 792a.

§ 160. Prevention of unfair labor practices.

(a) Powers of Board generally.

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable.

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months

prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(c) Reduction of testimony to writing; findings and orders of Board.

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the

Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Modification of findings or orders prior to filing record in court.

Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) Petition to court for enforcement of order; proceedings; review of judgment.

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside

of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court.

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) Institution of court proceedings as stay of Board's order.

The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) Jurisdiction of courts unaffected by limitations prescribed in sections 101 to 115 of this title.

When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101 to 115 of this title.

(i) Expeditious hearings on petitions.

Petitions filed under this subchapter shall be heard expeditiously, and if possible within ten days after they have been docketed.

(j) Injunctions.

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is

alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Hearings on jurisdictional strikes.

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 158 (b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process.

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b) (7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 158(b) (7) of this title if a charge against the employer under section 158(a) (2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be

served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony.—*Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b) (4) (D) of this title.

(m) Priority of cases.

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a) (3) or (b) (2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l) of this section. (July 5, 1935, ch. 372, § 10, 49 Stat. 453; June 25, 1936, ch. 804, 49 Stat. 1921; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 146; June 25, 1948, ch. 646, § 32 (a), (b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Aug. 28, 1959, Pub. L. 85-791, § 13, 72 Stat. 945; Sept. 14, 1959, Pub. L. 86-257, title VII, §§ 704(d), 706, 73 Stat. 544.)

REFERENCES IN TEXT

"Sections 101 to 115 of this title," referred to in the text, is a reference to act Mar. 23, 1932, ch. 90, 47 Stat. 70, popularly known as the Norris-LaGuardia Act.

Section 11 of that act, formerly classified to section 111 of this title, was repealed and reenacted as section 3692 of Title 18, Crimes and Criminal Procedure, by act June 25, 1948, ch. 645, § 21, 62 Stat. 862, eff. Sept. 1, 1948.

Section 12 of that act, formerly classified to section 112 of this title, was also repealed by act June 25, 1948, and is now covered by rule 42 (b), Federal Rules of Criminal Procedure, Title 18, Appendix.

CODIFICATION

In subsec. (e), reference to the District Court of the United States for the District of Columbia, which was eliminated by Pub. L. 85-791, § 13 (b), was previously omitted on authority of act June 25, 1948.

AMENDMENTS

1959—Subsec. (l). Pub. L. 86-257, § 704(d), included unfair labor practices within the meaning of sections 158(e) and 158(b) (7) of this title, and inserted the proviso prohibiting the officer or regional attorney from applying for any restraining order under section 158(b) (7) of this title if a charge against the employer under section 158(a) (2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue.

Subsec. (m). Pub. L. 86-257, § 706, added subsec. (m).

1958—Subsec. (d). Pub. L. 85-791, § 13(a), eliminated "a transcript of" following "until".

Subsec. (e). Pub. L. 85-791, § 13(b), eliminated "(including the United States Court of Appeals for the District of Columbia)" preceding ", or if all the courts", and substituted "file in the court the record in the proceedings, as provided in section 2112 of Title 28" for "certify and file in the court a transcript of the entire record in the proceedings including the pleadings and testimony upon which such order was entered and the findings and

order of the Board" in the first sentence, in second sentence substituted "the filing of such petition", for "such filing of" and eliminated "upon the pleadings, testimony and proceedings set forth in such transcript" following "make and enter", in fifth sentence substituted "member" for "members" following "before the Board, its", and substituted "record" for "transcript", and in seventh sentence, substituted "Upon the filing of the record with it the" for "The", and "section 1254 of Title 28" for "sections 346 and 347 of Title 28".

Subsec. (f). Pub. L. 85-791, § 13(c), substituted "transmitted by the clerk of the court to" for "served upon" and "the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28" for "a transcript of the entire record in the proceeding, certified by the Board including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board" in the second sentence, and in third sentence substituted "the filing of such petition," for "such filing", and eliminated "exclusive" preceding "jurisdiction".

1947—Act June 23, 1947, amended section generally and added subsecs. (j)–(l) which gives the Board general power to petition district court for temporary relief or restraining order, directs Board to hear and determine jurisdictional strikes, and to investigate boycotts and strikes to force recognition of an uncertified labor union and to petition district court for injunctive relief.

CHANGE OF NAME

The "circuit courts of appeal" and the "circuit courts of appeals of the United States" have been changed to "United States courts of appeals" by act June 25, 1948, § 32 (a), as amended by act May 24, 1949.

The "District Court of the United States for the District of Columbia" was changed to the "United States District Court for the District of Columbia" by act June 25, 1948, § 32 (b), as amended by act May 24, 1949. See sections 88 and 132 of Title 28, Judiciary and Judicial Procedure.

Supreme Court of the District of Columbia was changed to "District Court of the United States for the District of Columbia" by act June 25, 1936.

Court of Appeals of the District of Columbia was changed to United States Court of Appeals for the District of Columbia by act June 7, 1934, ch. 426, 48 Stat. 926.

EFFECTIVE DATE OF 1959 AMENDMENT

Amendment of section by Pub. L. 86-257 effective sixty days after Sept. 14, 1959, see section 707 of Pub. L. 86-257, set out as a note under section 153 of this title.

EFFECTIVE DATE OF 1947 AMENDMENT

Effective date of act June 23, 1947, see note set out under section 151 of this title.

COMMUNIST ORGANIZATIONS, AND MEMBERS

Prohibitions placed on Communist organizations, and members thereof, with respect to labor, see chapter 23 of Title 50, War and National Defense, particularly sections 782 (4A), 784, 792a and 841 to 844 of that title.

FEDERAL RULES OF CIVIL PROCEDURE

Application of rules, see rule 81, Title 28, Appendix, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 153, 159, 161, 168 of this title; title 50 section 792a.

§ 161. Investigatory powers of Board.

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—

(1) Documentary evidence; summoning witnesses and taking testimony.

The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any

matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) Court aid in compelling production of evidence and attendance of witnesses.

In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) Repealed. Pub. L. 91-452, title II, § 234, Oct. 15, 1970, 84 Stat. 930.

(4) Process, service and return; fees of witnesses.

Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) Process, where served.

All process of any court to which application may be made under this subchapter may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) Information and assistance from departments.

The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

(July 5, 1935, ch. 372, § 11, 49 Stat. 455; June 25, 1936, ch. 804, 49 Stat. 1921; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 150; Oct. 15, 1970, Pub. L. 91-452, title II, § 234, 84 Stat. 930.)

CODIFICATION

In par. (2), reference to "the District Court of the United States for the District of Columbia" was omitted on authority of act June 25, 1948, ch. 646, § 32 (b), 62 Stat. 991, since the District of Columbia constitutes a judicial district, and the District Court of the United States for the District of Columbia is included within the term "any district court of the United States" as used in such subsection. See sections 88 and 132 of Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

1970—Par. (3). Pub. L. 91-452 struck out par. (3) which related to the immunity from prosecution of any individual compelled to testify or produce evidence after claiming his privilege against self-incrimination.

1947—Act June 23, 1947, restated the section with the addition of provisions requiring the issuance of subpoenas as a matter of course on the request of any party.

CHANGE OF NAME

Supreme Court of the District of Columbia was changed to the "District Court of the United States for the District of Columbia" by act June 25, 1936.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-452 effective on the sixtieth day following Oct. 15, 1970, see section 260 of Pub. L. 91-452, set out as a note under section 6001 of Title 18, Crimes and Criminal Procedure.

EFFECTIVE DATE OF 1947 AMENDMENT

Effective date of act June 23, 1947, see note set out under section 151 of this title.

SAVINGS PROVISION

Amendment by Pub. L. 91-452 not to affect any immunity to which any individual is entitled under this section by reason of any testimony given before the sixtieth day following Oct. 15, 1970, see section 260 of Pub. L. 91-452, set out as a note under section 6001 of Title 18, Crimes and Criminal Procedure.

CROSS REFERENCES

Immunity of witnesses, see section 6001 et seq. of Title 18, Crimes and Criminal Procedure.

FEDERAL RULES OF CIVIL PROCEDURE

Subpoena, see rule 45, Title 28, Appendix, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 661 of this title.

§ 162. Offenses and penalties.

Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this subchapter shall be punished by a fine of not more than \$5,000 or by imprisonment.

ment for not more than one year, or both. (July 5, 1935, ch. 372, § 12, 49 Stat. 456; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 151.)

AMENDMENTS

1947—Act June 23, 1947, reenacted section without change.

EFFECTIVE DATE OF 1947 AMENDMENT

Effective date of act June 23, 1947, see note set out under section 151 of this title.

§ 163. Right to strike preserved.

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right. (July 5, 1935, ch. 372, § 13, 49 Stat. 457; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 151.)

AMENDMENTS

1947—Act June 23, 1947, amended section so as to provide that except as specifically provided for in this subchapter nothing shall interfere with or diminish the right to strike and that nothing was to be construed to affect the limitations or qualifications on the right to strike, thus recognizing that the right to strike is not an unlimited and unqualified right.

EFFECTIVE DATE OF 1947 AMENDMENT

Effective date of act June 23, 1947, see note set out under section 151 of this title.

§ 164. Supervisors as union members; recognition by employers; declination of jurisdiction by Board over labor disputes; assertion of jurisdiction by State or Territorial agencies and courts.

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

(c) (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction. (July 5, 1935, ch. 372, § 14, 49 Stat. 457; June 23, 1947, title I, § 101, 61 Stat. 151; Sept. 14, 1959, Pub. L. 86-257, title VII, § 701(a), 73 Stat. 541.)

REFERENCES IN TEXT

The Administrative Procedure Act, referred to in subsec. (c), is now covered by section 551 et. seq. of Title 5, Government Organization and Employees:

AMENDMENTS

1959—Subsec. (c). Pub. L. 86-257 added subsec. (c).

1947—Act June 23, 1947, amended section generally by inserting new subject matter. Section formerly referred to conflict of laws and is now covered by section 165 of this title.

EFFECTIVE DATE OF 1947 AMENDMENT

Effective date of act June 23, 1947, see note set out under section 151 of this title.

§ 165. Conflict of laws.

Wherever the application of the provision of section 672 of Title 11 conflicts with the application of the provisions of this subchapter, this subchapter shall prevail: *Provided*, That in any situation where the provisions of this subchapter cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect. (July 5, 1935, ch. 372, § 5, 49 Stat. 457; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 151.)

AMENDMENTS

1947—Act June 23, 1947, amended section generally by inserting new subject matter which was formerly covered by section 164 of this title. Section formerly referred to separability provisions and is now covered by section 166 of this title.

EFFECTIVE DATE OF 1947 AMENDMENT

Effective date of act June 23, 1947, see note set out under section 151 of this title.

§ 166. Separability of provisions.

If any provision of this subchapter, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this subchapter, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby. (July 5, 1935, ch. 372, § 16, 49 Stat. 457; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 151.)

AMENDMENTS

1947—Act June 23, 1947, amended section generally by inserting new subject matter which was formerly covered by section 165 of this title. Section formerly referred to short title of chapter and is now covered by section 167 of this title.

EFFECTIVE DATE OF 1947 AMENDMENT

Effective date of act June 23, 1947, see note set out under section 151 of this title.

§ 167. Short title of subchapter.

This subchapter may be cited as the "National Labor Relations Act". (July 5, 1935, ch. 372, § 17, as added June 23, 1947, ch. 120, title I, § 101, 61 Stat. 152.)

EFFECTIVE DATE

Effective date of act June 23, 1947, see note set out under section 151 of this title.

§ 168. Validation of certificates and other Board actions.

No petition entertained, no investigation made, no election held, and no certification issued by the National Labor Relations Board, under any of the provisions of section 159 of this title, shall be invalid by reason of the failure of the Congress of Industrial Organizations to have complied with the requirements of section 159 (f), (g), or (h) of this title

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prior to December 22, 1949, or by reason of the failure of the American Federation of Labor to have complied with the provisions of section 159 (f), (g), or (h) of this title prior to November 7, 1947: *Provided*, That no liability shall be imposed under any provision of this chapter upon any person for failure to honor any election or certificate referred to above, prior to October 22, 1951: *Provided, however*, That this proviso shall not have the effect of setting aside or in any way affecting judgments or decrees heretofore entered under section 160 (e) or (f) of this title and which have become final. (July 5, 1935, ch. 372, § 18, as added Oct. 22, 1951, ch. 534, § 1 (a), 65 Stat. 601.)

REFERENCES IN TEXT

Section 159 (f), (g), or (h) of this title, referred to in the text, were repealed. See section 431 of this title.

SUBCHAPTER III.—CONCILIATION OF LABOR DISPUTES; NATIONAL EMERGENCIES

§ 171. Declaration of purpose and policy.

It is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies. (June 23, 1947, ch. 120, title II, § 201, 61 Stat. 152.)

EX. ORD. NO. 11482. CONSTRUCTION INDUSTRY COLLECTIVE BARGAINING COMMISSION

Ex. Ord. No. 11482, Sept. 22, 1969, 34 F.R. 14723, provided:

WHEREAS, the national interest requires a steady level of construction activity; and

WHEREAS, labor-management relations in the construction industry reflect numerous signs of strife and tensions and the national interest requires an improvement in the procedures and performance of collective bargaining in this vital sector; and

WHEREAS, the continuation of these problems tend to encourage widespread public demand for governmental regulation and controls; and

WHEREAS, the achievement of greater stability in the flow of construction volume is essential; and

WHEREAS, the Federal government and local and State governments, being major industry consumers, have a substantial interest in construction activity; and

WHEREAS, the labor and management organizations in the construction industry recognize that industrial strife tends to disrupt construction operations and adversely to affect other sectors, including the public; and

WHEREAS, the Commission hereinafter provided for is designed to develop voluntary tripartite procedures to be followed in the settlement of disputes over the terms of collective bargaining agreements in the construction industry involving the standard labor and management organizations, and to engage in such related activities as will facilitate industrial peace and stability in the construction industry but the establishment of the Commission is not intended to provide for compulsory arbitration or for any compulsory limitation on the right to strike or lockout;

Now, THEREFORE, by virtue of the authority vested in me as the President of the United States, it is ordered as follows:

SECTION 1. There is hereby established a Construction Industry Collective Bargaining Commission (hereinafter referred to as the Commission). The Commission shall be composed of twelve members as follows: (1) The Secretary of Labor, who is hereby designated as the Chairman of the Commission, (2) the Director of the Federal Mediation and Conciliation Service, and (3) the following members, all of whom shall be appointed by the President: (i) two members representative of the public, (ii) four representatives of labor organizations in the construction industry, and (iii) four representatives of employers in that industry. Representatives of the labor organizations and the employers shall be appointed after consultation with various national labor organizations and contractor associations in the construction industry. Alternate members also may be designated.

SEC. 2. The Commission shall have an Executive Director, designated by the Chairman, who shall assist the Chairman and the Commission in the performance of their functions as they may direct. The staff to be made available to the Commission shall include a person drawn from the Federal Mediation and Conciliation Service to assist in coordination of mediation activities of the Service and the work of the Commission, a person from Department of Labor staff engaged in the administration of the Davis-Bacon Act [sections 276a to 276a-5 of Title 40, Public Buildings, Property, and Works], and such research and other personnel as may be necessary.

SEC. 3. The general objectives of the Commission shall include, but need not be limited to, the following:

(a) To study relevant private and public policies; (i) to upgrade the skills of, and to increase the labor force engaged in the construction industry and improve training procedures; (ii) to reduce the instability of demand for construction labor, and (iii) to provide a greater number of weeks of work per year to those engaged in the industry.

(b) To strengthen the role of the national labor organizations and the national associations of contractors in the dispute settlement process, and to enhance their responsibility for the results of collective bargaining in the industry.

(c) To establish more effective machinery for the resolution of disputes over the terms of collective bargaining agreements which at the same time recognizes the interests of each branch of the industry and preserves existing procedures that have been effective.

(d) To identify means to improve and adapt the structure of collective bargaining in the industry to meet the challenges of technological innovation and changing demands.

SEC. 4. The Commission is authorized to conduct studies and to make general recommendations respecting any problems relating to collective bargaining in the construction industry which may be presented to it from labor, management, or the public representatives. Such

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Plaintiff-Appellant,

v.

COMMITTEE OF INTERNS AND RESIDENTS, AND
NEW YORK STATE LABOR RELATIONS BOARD,

Defendants-Appellees.

No. 77-6075

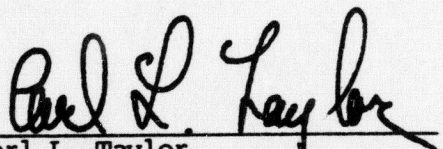
CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the Board's brief and one copy of the appendix to the briefs in the above-captioned case, have this day been served by hand upon the following counsel at the addresses listed below:

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Dated at Washington, D.C.
This 6th day of June, 1977.


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